In The

Supreme Court of the United States

October Term, 1977

77-516

No. A-148

Supreme Court, U. S.
FILED
SEP 1977
MICHAEL RODAK, JR., CLERK

JOSEPHINE ZOLA,
Petitioner,

-v.-

CITY OF WAVERLY,
Respondent.

OF

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR PIKE COUNTY, OHIO

KEITH F. HENLEY
2509 West Broad Street
Columbus, Ohio 43204

Counsel for Petitioner

September, 1, 1977

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF STATUTES, ORDINANCES, CASES . . . II

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DENIES PETITIONER DUE PROCESS BY CONVICTING PETITIONER OF VIOLATING A MUNICIPAL ORDINANCE WHERE THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT EVERY ELEMENT OF THE OFFICE. 4

2. THE DECISION BELOW DENIES PETITIONER EQUAL PROTECTION OF THE LAWS AND DUE PROCESS BY FINDING HER GUILTY OF VIOLATING A MUNICIPAL ORDINANCE WHERE PRIOR INTERPRETATIONS OF A PARALLEL STATE LAW BY THE HIGHEST STATE COURT HAVE BEEN TO THE CONTRARY. 6

CONCLUSION 9

APPENDIX

TABLE OF STATUTES, ORDINANCES, CASES

UNITED STATES CONSTITUTION

ARTICLE VI 3

ARTICLE XIV 3

OHIO REVISED CODE

ORC 4511.42 . . . . . 3, 4, 5

ORC 4511.01 (TT) 3, 4, 5

ORC 4513.03 . . . . . 3, 4, 5

CITY OF WAVERLY ORDINANCES

SECTION 331.17 . . . . . 3, 4, 5

SECTION 301.32 . . . . . 3, 4, 5

SECTION 337.02 . . . . . 3, 4, 5

DEMING, A MINOR, APPELLANT V. OSINSKI,
21 OHIO APP. 2ND 89 (1969)
29 OHIO STATE 2ND 189 . . . . . 3, 4

MORRIS V. BLOOMGREN,
127 OHIO STATE 147 . . . . . 3, 4

VARHON V. NEW HAMPSHIRE
414 U.S. 478 (1973) 3, 5

THOMPSON V. LOUISVILLE
362 U.S. 199 (1960) 3, 5

HICKS V. MIRANDA
95 SUPREME COURT 2281, 422 U.S.
332 45 L. ED. 2D 223 4

C.J.S. JUDGMENTS 891-892 4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. A-148

JOSEPHINE ZOLA, Petitioner,

v.

CITY OF WAVERLY, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR PIKE COUNTY, OHIO

The petitioner Josephine Zola respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for Pike County, Ohio entered in this proceeding on January 14, 1977.

OPINION BELOW

The opinion of the Court of Appeals for Pike County, Ohio appears in the Appendix hereto. The Supreme Court of Ohio entered an Order on May 12, 1977, denying an appeal as of right by petitioner but did not issue an opinion. The order of the Supreme Court of Ohio is included in the Appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for Pike County, Ohio was entered on January 14,

1977. A timely appeal was taken to the Ohio Supreme Court which denied the appeal on May 12, 1977. Thereafter, petitioner was, on August 18, 1977, given an extension of time to and including September 9, 1977, to file a Petition for Writ of Certiorari and this Petition for Certiorari was filed on or prior to that date. This Court's jurisdiction is invoked under 28 U.S.C.

QUESTIONS PRESENTED

1. Whether it is a denial of Due Process to convict an individual of violation of a municipal ordinance where the prosecution fails to prove one element of the offense with which the individual is charged.

2. Whether it is a denial of Due Process and equal protection of the laws for a court to find an individual guilty of violating a municipal ordinance where previous interpretations of an identically parallel state law by the highest state court held to the contrary.

STATEMENT OF THE CASE

The facts in this case are not in dispute.

Basically, a car being driven by petitioner, Mrs. Zola was proceeding on State Rt. 104 when it slowed to a stop and proceeded to make a left turn. At this point it collided with a motorcycle driven by a David Rudd. The accident occurred at approximately 8:00 p.m. on the evening of September 10, 1975. Patrolman Beekman arrived at the accident scene at approximately 8:15 and fixed the time of the accident at 8:00 p.m. based upon the time he was dispatched and the distance travelled to

arrive at the scene. Likewise, the EMS Report was dispatched at 8:11 p.m. and arrived at the accident scene at 8:12 p.m.

Even giving all the other witnesses the benefit of the doubt, the earliest the accident could have taken place was 7:45 p.m.

The only other testimony important to this appeal concerned whether the driver of the motorcycle, David Rudd, had turned on the headlights of the motorcycle at the time of the accident.

On cross-examination, Rudd testified as follows:

> Q Mr. Rudd, do you remember turning on your lights when you started this journey that eventually evolved into the accident?
> A I would say I did.
> Q Do you remember?
> A No. Not definitely. (Transcript, pages 8 and 9)

Appellant testified as follows:

> Q Did you notice at any time whether or not David Rudd had his head lights on?
> A I didn't see any lights coming toward me. That's why I proceeded to turn. (Transcript, page 12)

Thus, the evidence fairly well established that David Rudd, the driver of the other vehicle, was probably driving without headlights.

The final fact the lower court was asked to consider, and which this court is asked to

consider is the time of sunset on the date of the accident. The official time from the weather bureau fixes sunset for the area of Ohio in question at 6:50 p.m. Thus the accident occurred at least one hour and perhaps seventy-five minutes after sunset.

The Pike County Court, First District, Waverly, Ohio found defendant guilty. Thereafter, petitioner appealed to the Pike County Court of Appeals. Respondent did not file or reply or brief in opposition to the appeal. The Court of Appeals, however, affirmed the Pike County Court. The Supreme Court of Ohio thereafter denied an appeal as of right without briefs or hearing or any reply or brief in opposition filed by the respondent. Because of this denial of petitioner's rights by the lower courts, petitioner has filed this writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DENIES PETITIONER DUE PROCESS BY CONVICTING PETITIONER OF VIOLATING A MUNICIPAL ORDINANCE WHERE THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT EVERY ELEMENT OF THE OFFENSE.

In this case, petitioner was found guilty of violating Waverly Municipal Ordinance Section 331.17. That ordinance provides as follows:

331.17 Right of Way When Turning Left. The operator of a vehicle intending to turn to the left shall yield the right of way to any

vehicle approaching from the opposite direction. (O.R.C. 4511.42)

Right of Way is defined as follows:

301.32 Right of Way
"Right of Way" means the right of a vehicle or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or he is moving in preference to another vehicle or pedestrian approaching from a different direction into its or his path. (O.R.C. 4511.01(TT))

As noted by the Waverly municipal ordinances, these ordinances parallel sections of the Ohio Revised Code. In fact, the language of the parallel statutes is identical.

In Vachon v. New Hampshire 414 U.S. 478 (1973)), this court stated at page 480, "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged. ..... violates due process." Harris v. United States, 404 U.S. 1232, 1233 (1971). Thompson v. Louisville, 362 U.S. 199 (1960); Johnson v. Florida, 391 U.S. 596 (1968); see also Adderley v. Florida, 385 U.S. 39, 44 (1966).

In the instant case, the prosecution failed to prove beyond any weight of evidence that the vehicle approaching from the opposite direction was proceeding in a lawful manner. Both Waverly Ordinance Section 337.02 and Ohio Revised Code Section 4513.03 require an oncoming vehicle to have on a headlight one-half hour after sunset. The only evidence of this

fact was based on the testimony of two witnesses. The driver of the oncoming vehicle testified he did not remember whether his vehicle's headlight was lighted. Petitioner, Josephine Zola definitely remembered seeing no headlights on any oncoming vehicle. The only reasonable inference that could be drawn from this evidence was that the oncoming vehicle was without headlights seventy-five minutes after sunset, a statutory requirement, which clearly was required to be proven beyond a reasonable doubt.

For the lower court to convict petitioner without proof of this crucial element of the offense was a denial of due process.

2. THE DECISION BELOW DENIES PETITIONER EQUAL PROTECTION OF THE LAWS AND DUE PROCESS BY FINDING HER GUILTY OF VIOLATING A MUNICIPAL ORDINANCE WHERE PRIOR INTERPRETATIONS OF A PARALLEL STATE LAW BY THE HIGHEST STATE COURT HAVE BEEN TO THE CONTRARY.

The decision of the lower court in this case ignores the interrelationship between the Waverly Ordinances and the Ohio Statutes.

Such a decision violates appellant's rights under Article XIV of the United States Constitution regarding equal protection of the laws. It means that although the Ohio Statutes and Waverly Ordinances are the same, the application of the law depends on which court or in which jurisdiction a person is charged with an

offense. Such an unequal application of law is unconstitutional. The decision of the lower court should apply the same interpretation of law to Waverly law that Ohio Courts have applied to the Ohio Statutes after which the Waverly Ordinances are patterned. To hold otherwise is to deprive appellant of equal protection of the laws. See Hicks v. Miranda, Cal., 95 Supreme Court 2281, 422 U.S. 332, 45 L. Ed. 2d 223, and conclusiveness of foreign judgments and enforcement in other states see the C.J.S. title Judgments 891-892 also 34 C.J. page 1132 note 3 et seq.

Further, it deprives appellant of the right to be informed of the charges against her, contrary to Article VI of the United States Constitution. If different jurisdictions within the same state can interpret and apply the same statutory language differently, a party has no idea of the proof required to convict him.

In this case, the evidence showed that although appellant was turning left and struck a vehicle approaching from the opposite direction, the prosecution failed to prove the other vehicle appellant struck was being operated in a lawful manner. Contrary to O.R.C. 4513.03 and Waverly Ordinance 337.02, the other vehicle did not have headlights on one-half hour after sunset.

The lower court should have given the same interpretation under the circumstances that would have been applied to Ohio Law after which the Waverly Ordinances are modeled.

The decision of the lower court, if allowed to stand, would result in an unconstitutional application of the laws. From the Deming v.

Osinski, 21 Ohio App. 2nd 89 (1969) and also Morris v. Bloomgren 127 Ohio State 147, wherein the Ohio Supreme Court stated, in defining the Right of Way, the following:

"Section 6310-28 and 6310-28A,[1] General Code, confer an absolute right of way upon the motor vehicle approaching from the right, qualified only by the requirement that, in proceeding uninterruptedly in the direction in which it is moving, it must proceed in a lawful manner. The phrase "in a lawful manner" is the pole star of the traffic sections, pointing out the sine qua non obligation cast upon the vehicle approaching from the right, which, to maintain its right, it must observe."

[1]Now Section 4511.42 and 4511.02 (TT) Revised Code.

While Article XIV of the United States Constitution is generally viewed as requiring equal protection of laws by a state to a citizen of another state who is transacting business or performing some act in the first state, it is quite apparent from Vachon v. New Hampshire, supra and Thompson v. Louisville, 362 U.S. 199 (1960) that a state must provide these same rights to its own citizens. This is true even where the offense of which the person has been convicted is only a minor offense with a small fine.

Petitioner requests this court to apply these standards to the instant case.

CONCLUSION

Appellant in this case was convicted of violating a municipal ordinance which parallels an Ohio Statute. The entire question was whether the oncoming vehicle which appellant struck was proceeding in a lawful manner.

Appellant submits there was barely a scintilla of evidence that the oncoming vehicle was proceeding in a lawful manner. The weight of the evidence by any standard showed the oncoming vehicle was not proceeding in a lawful manner. The prosecution should have been required to prove, or at least establish a reasonable inference, that the oncoming vehicle was proceeding in a lawful manner. When the prosecution did not, the trial court should have dismissed the case.

The Court of Appeals should have followed past decisions of the Ohio Supreme Court and remanded the case to have the trial court dismiss the charges against Appellant as a matter of law. This court is respectfully requested to reverse the decision of the Court of Appeals for the reasons set forth above.

Respectfully submitted,

_____

Keith F. Henley

APPENDIX: Constitution, Statutes and Ordinances

UNITED STATES CONSTITUTION

AMENDMENT (VI)

(RIGHTS OF ACCUSED)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT (XIV)

(RIGHTS OF CITIZENS)

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE SECTION

O.R.C. 4511.01 Definitions

(TT) "Right of way" means the right of a vehicle, streetcar, trackless trolley, or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or he is moving in preference to another vehicle, streetcar, trackless trolley, or pedestrian approaching from a different direction into its or his path.

4511.42

Right of way when turning left.
The operator of a vehicle, streetcar, or trackless trolley intending to turn to the left shall yield the right of way to any vehicle, streetcar, or trackless trolley approaching from the opposite direction.

4513.03

Lighted lights required.
Every vehicle upon a street or highway within this state during the time from one-half hour after sunset to one-half hour before sunrise, and at any other time when there are unfavorable atmospheric conditions or when there is not sufficient natural light to render discernible persons, vehicles, and substantial objects on the highway at a distance of one thousand feet ahead, shall display lighted

lights and illuminating devices as required by sections 4513.04 to 4513.37 of the Revised Code, for different classes of vehicles. No motor vehicle, during such times, shall be operated upon a street or highway within this state using only parking lights as illumination.

Whenever in such sections a requirement is declared as to the distance from which certain lamps and devices shall render objects visible, or within which such lamps or devices shall be visible, such distance shall be measured upon a straight level unlighted highway under normal atmospheric conditions unless a different condition is expressly stated.

Whenever in such sections a requirement is declared as to the mounted height of lights or devices, it shall mean from the center of such light or device to the level ground upon which the vehicle stands.

301.32 RIGHT OF WAY.

"Right of way: means the right of a vehicle or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or he is moving in preference to another vehicle or pedestrian approaching from a different direction into its or his path. (ORC 4511.01 (TT))

331.17 RIGHT OF WAY WHEN TURNING LEFT.

The operator of a vehicle intending to turn left shall yield the right of way to any vehicle approaching from the opposite direction. (ORC 4511.42)

337.02 LIGHTED LIGHTS: MEASUREMENT OF DISTANCE AND HEIGHTS

(a) Every vehicle upon a street or highway during the time from one-half hour after sunset to one-half hour before sunrise, and at any other time when there are unfavorable atmospheric conditions or when there is not sufficient natural light to render discernible persons, vehicles and substantial objects on the street or highway at a distance of 1,000 feet ahead, shall display lighted lights and illuminating devices as required by this chapter for different classes of vehicles. No motor vehicle, during such times, shall be operated upon a street or highway using only parking lights as illumination.

(b) Whenever in such sections a requirement is declared as to the distance from which certain lights and devices shall render objects visible, or within which such lights or devices shall be visible, such distance shall be measured upon a straight level unlighted street under normal atmospheric conditions unless a different condition is expressly stated.

(c) Whenever in such sections a requirement is declared as to the mounted height of lights or devices, it shall mean from the center of such light or device to the level ground upon which the vehicle stands. (ORC 4513.03)

COURT OF APPEALS, PIKE COUNTY, OHIO

The City of Waverly,
Plaintiff-Appellee No. 286

vs. JUDGMENT ENTRY

Josephine Zola,
Defendant-Appellant

This cause came on to be heard upon the appeal on consideration of law, assignments of error, the record from the County Court of Pike County and the brief of appellant.

Upon consideration thereof, the court finds that the assignments of error are not well taken for the reasons set forth in the opinion filed herein and made a part thereof.

It is, therefore, ordered by the court that the judgment of the County Court of Pike County be, and the same is hereby affirmed.

It is further ordered that a mandate be sent to the County Court of Pike County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Judgment, with a copy of the Opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by her counsel, excepts.

_____

Presiding Judge

COURT OF APPEALS, PIKE COUNTY, OHIO

The City of Waverly,
Plaintiff-Appellee

No. 286

vs.

OPINION

Josephine Zola,
Defendant-Appellant

COUNSEL FOR APPELLEE	COUNSEL FOR APPELLANT
Jesse Cole, Jr.	Keith F. Henley
City Solicitor	2509 W. Broad Street
Waverly, Ohio 45690	Columbus, Ohio 45204

GRAY, P.J.:

This case is on appeal from the County Court of Pike County. On September 10, 1975, in the City of Waverly, an accident occurred between motor vehicles operated by defendant and a Mr. Rudd. Rudd was operating his motorcycle in a southbound direction on State Route 104. At that time and place defendant was attempting to make a left hand turn into the place of business of Barchs Suzuki Shop.

The defense was that it was after dark and Rudd did not have a light lit upon his motorcycle and therefore he was not lawfully in the intersection and therefore defendant was not guilty of making an improper left turn in front of Rudd's motorcycle. The case was tried to the court without the intervention of a jury and it found defendant guilty.

The evidence produced by the state was that the accident happened between 7:45 to 8:15 p.m. on the above date and that there might have been a light on the motorcycle or that such light was not needed at that time of day. Thus a conflict in the evidence was developed. The trial court found for the City. Defendant feeling aggrieved by this result filed her notice of appeal and lodged the case in this court for review.

There is really only one question involved, and that is whether the decision of the trial

Court was based upon substantial evidence and if there was substantial evidence this court is required to affirm.

In the case of State vs. Clay, 34 Ohio St. 2d 250, the Supreme Court has said that when there is a conflict in the evidence the resolution of such conflict is with the factfinder which in this case is the trial court. The Supreme Court on many occasions has said that where there is substantial evidence upon which the trial court might base its findings the court of appeals cannot find otherwise and reverse the judgment of the trial court. See Trickey vs. Trickey, 158 Ohio St. 9, 14 and In re Tilton, 161 Ohio St. 571, 577.

For the above reasons the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED

Abele, J. concurs;
Stephenson, J. concurs with attached concuring opinion

Stephenson, J., - Concurring:

The pertinent sections of the ordinances of the City of Waverly are the following:

"301.32 RIGHT OF WAY.
"Right of way" means the right of a vehicle or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or he is moving in preference to another vehicle or pedestrian approaching from a different direction into its or his path. (ORC 4511.01 (TT))

331.17 RIGHT OF WAY WHEN TURNING LEFT.
The operator of a vehicle intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction. (ORC 4511.42)

337.02 LIGHTED LIGHTS: MEASUREMENT OF DISTANCES AND HEIGHTS
(a) Every vehicle upon a street or highway during the time from one-half hour after sunset to one-half hour before sunrise, and at any other time when there are unfavorable atmospheric conditions or when there is not sufficient natural light to render discernible persons, vehicles and substantial objects on the street or highway at a distance of 1,000 feet ahead, shall display lighted lights and illuminating devices as

required by this chapter for different classes of vehicles. No motor vehicle, during such times, shall be operated upon a street or highway using only parking lights as illunination.

The above sections are in pari materia so that, if the operator of the motorcycle was violating Sec. 337.02, he did not have preferential right of way as defined in Sec. 301.32 and appellant would not be guilty of violating Sec. 331.17. Morris v Bloomgren, 127 Ohio St. 147; Deming v Osenski, 24 Ohio St. 2d 179.

The pivotal issue in this appeal is not whether lights were required under that portion of Sec. 337.02 which provides "..... and any other time when there are unfavorable atmospheric conditions, etc. The evidence upon that issue was conflicting, and, therefore, was a question of fact for resolution by the trial court, a determination of or against appellant being supported by sufficient evidence.

the light on but could not remember definitely. Appellant testified that prior to her turn she did not see any lights coming toward her and, upon that basis, made the turn. No other witness could testify directly whether or not the motorcycle displayed it's light.

The trial court had the opportunity to see the witnesses pass upon the credibility and weight to be given to their testimony. In order to reverse upon the weight of the evidence, it must be manifest that the judgment is against the manifest weight of the evidence. Breese v State, 12 Ohio St. 146; City of Columbus v Blanchard, 120 Ohio App. 72. Giving consideration to the degree of proof required a criminal case, (Cooper v State, 121 Ohio St. 562), I am not persuaded the judgment should be reversed for insufficiency of the evidence. Hence, I concur in the judgment.

The dispositive issue is whether the motorcycle operator lost his preferential right of way by violation of that part of Sec. 337.02 which requires display of lighted lights "during the time from one-half hour after sunset to one-half hour before sunrise." This portion of the ordinance imposes a mandatory requirement within such time period irrespective whether lights might also be required by atmospheric conditions, etc. Since the alleged violation here occurred no earlier than 7:45 P.M., considering the fact that sunset occurred on September 10, 1975 at 6:50 P.M.*, it follows that lighted headlights was statutorily required. For authority to judicially notice the time of sunset see 31A Corpus Juris Secundum 148, Sec. 100.

With respect to whether the motorcycle had it's headlight of the operator testified he had

*(It is assumed the time of sunset is correct)

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,)	1977 TERM
)	
City of Columbus.)	To wit: May 12, 1977
City of Waverly, Appellee.	No. 77-292
	APPEAL FROM THE COURT OF APPEALS
vs.	
Josephine Zola, Appellant.	for Pike County

This cause, here on appeal as of right from the Court of Appeals for Pike County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Pike County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19___

_____ Clerk

_____ Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)	1977 TERM
)	
City of Columbus.)	To wit: May 12, 1977
City of Waverly,)	No. 77-292
Appellee.)	
)	MOTION FOR AN ORDER
vs.)	DIRECTING THE
)	COURT OF APPEALS
Josephine Zola,)	
Appellant.)	for Pike County
)	
)	TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Keith F. Henley

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the

foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19____

_____Clerk

_____Deputy